In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1082

JAMES RUSSELL HAWTHORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1966. The petition for a writ of certiorari was filed on March 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statute (18 U.S.C. 1952) punishing the use of interstate facilities with intent to distribute the proceeds of an illegal gambling enterprise also requires an intent to violate State law.

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STATUTE INVOLVED

18 U.S.C. 1952 (75 Stat. 498) provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
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> (1) distribute the proceeds of any unlawful activity; or
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> (2) commit any crime of violence to further any unlawful activity; or
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> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
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> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
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> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax had not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

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STATEMENT

Petitioner was charged in the United States District Court for the Southern District of West Virginia with violating 18 U.S.C. 1952 by traveling in

interstate commerce with intent to carry on an illegal gambling enterprise (count 1) and by using an interstate facility with intent to distribute the proceeds derived from an unlawful gambling enterprise (count 2) (J.A. 4–5).[1] After a jury trial, petitioner was convicted on both counts and sentenced to concurrent five-year terms of imprisonment (J.A. 3). On appeal, the conviction on the first count was reversed on the ground that the travel specified therein was not sufficiently related to petitioner's West Virginia gambling enterprise. The conviction on the second count was affirmed, and the case was remanded for reconsideration of the sentence in light of the reversal on the first count.

The evidence showed that in October 1962 petitioner operated twelve slot machines in one county in Indiana and had remarked that he expected "to be able to branch out into another county after the coming election" (J.A. 19). On April 25, 1963, he arranged to have his share of the proceeds from three slot machines ($235) sent from Indiana to West Virginia by Western Union money order (J.A. 25–31, 173).[2] Petitioner received the money order in West Virginia and cashed it (J.A. 36, 47–49, 179–180).

At the conclusion of the case the court gave the following instructions on the elements of the offense charged in count 2 (J.A. 168–169):

> * * * The elements necessary to convict in the second count are, first, that defendant Hawthorne

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

[2] Petitioner had moved to West Virginia where he set up the gambling club which was the subject of count 1 (J.A. 50–61).

wilfully caused the use of a facility in interstate commerce—to be exact, the wires of the Western Union Telegraph Company.

Second, that he caused the use of these facilities with the intent to distribute the proceeds of an unlawful activity, that is, the slot machines in Indiana.

Third, you would have to find that the slot machines were kept in violation of the law of State of Indiana, and, fourth, that after the telegram in question was sent defendant Hawthorne performed or attempted to perform some act which tended to distribute these proceeds.

The court had previously charged that "the defendant must wilfully cause such use of the interstate facility. The word wilfully * * * in the context with which we use it here means knowingly or with a bad purpose" (J.A. 168). The court noted that the requirement of wilfulness applied only to the element of causing the use of an interstate facility. Petitioner did not except to any of the instructions (J.A. 172).

ARGUMENT

Petitioner admitted at trial that the slot machines in question were being kept in violation of Indiana law.[3] Although he did not object to the trial court's

[3] In his closing argument to the jury, petitioner's counsel stated as follows (J.A. 152):

"Indiana has passed a law, Burns Statute, which outlaws slot machines. West Virginia has also passed a law which outlaws gambling, keeping a common gaming house, and they are separate laws and separate jurisdictions. Now, in this case we have not in any way tried to say that Mr. Hawthorne has not

jury instructions, he now contends that the court should have charged that an intent to violate Indiana law was an element of the crime under 18 U.S.C. 1952 (*supra*, p. 2). We submit that the statute does not require such an instruction.

Insofar as applicable here, Section 1952 makes it a crime to use an interstate facility with the intent to distribute the proceeds of "any unlawful activity" and thereafter to distribute or attempt to distribute those proceeds. The phrase "unlawful activity" is defined to include any business enterprise involving gambling in violation of the law of the State where the gambling offense occurs. Thus, the fact that Indiana makes possessing slot machines a crime (4 Burns Indiana Statutes Ann., § 10–2326) is sufficient to render a business enterprise involving such possession an "unlawful activity" within the meaning of the statute. The gravamen of the offense is the distribution of illicit proceeds in interstate commerce, and the statute explicitly requires that, in order to convict, the intent to distribute such proceeds must be shown.[4]

An intent to violate any particular State law, however, is not an element of the offense. Such an intent is not expressly contemplated by the statute, and there is no sound basis for including it as part of the of-

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broken this law or this law. In fact, we brought witnesses and had them testify to the fact that he did break those laws. We admit it. He broke the law of Indiana and the law of West Virginia."

[4] This construction of the statute does not eliminate intent as an element of the crime and therefore is not in conflict with the principles stated in *Morissette* v. *United States*, 342 U.S. 246.

fense by implication.[5] A major purpose of the statute was to impede multistate criminal operations by closing the channels of interstate commerce to the knowing distribution of profits arising from the defined "unlawful activities." In seeking this end, Congress—cognizant of the nature of multistate criminal organizations—considered it immaterial whether the persons intentionally using these channels for the proscribed purpose were personally guilty of violating the State law which rendered the underlying activity unlawful. Adopting the Attorney General's statement in support of the bill, the Senate Report on Section 1952 stated that "only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials. So we believe that the Federal Government has a definite responsibility to move against these people and limit their use of interstate commerce." S. Rep. No. 644, 87th Cong., 1st Sess., p. 3.

Therefore, the showing that petitioner wilfully caused the use of an interstate facility with the intent

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[5] When intent is implied as an element of an offense, what is commonly referred to is a purpose to perform certain acts or to bring about certain physical results, not an intent as to the legal consequences of those acts or results. See Williams, *Criminal Law—The General Part* (2d ed. 1961), Ch. 2; American Law Institute, *Model Penal Code* (Tentative Draft No. 4), § 2.02. Petitioner does not, and cannot properly, contend that someone's (not necessarily petitioner's) intent to "own, store, keep, [or] possess" slot machines is an element of Section 1952. Such an intent is not a part of the crime defined by 4 Burns Indiana Statutes Ann., § 10–2326, and it is clear that Congress did not intend to augment in any way the substantive laws which make the various activities referred to in Section 1952 "unlawful."

to distribute the profits of an unlawful activity—*i.e.*, the operation of slot machines in Indiana—and thereafter did distribute those profits is sufficient to make out a violation of 18 U.S.C. 1952.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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